

FILED

JUL 27 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GONZALO GARCIA-ALCAZAR, aka
Javier Perez-Rodriguez,

Defendant - Appellant.

No. 05-50492

D.C. Nos. CR-03-02509-BTM
CR-03-02085-BTM

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Submitted July 24, 2006^{**}

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

Gonzalo Garcia-Alcazar appeals from his conviction by bench trial and the 100-month sentence imposed for attempted entry after deportation in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Garcia-Alcazar contends that his due process rights were violated by the government's loss of potentially exculpatory evidence prior to trial. Because he has demonstrated neither prejudice to his defense nor bad faith on the part of the government, he cannot prevail on this claim. *See United States v. Dring*, 930 F.2d 687, 693-94 (9th Cir. 1991).

Garcia-Alcazar also contends that his constitutional rights were violated by the use of a prior conviction to enhance his sentence because he did not admit to the prior conviction and it was not proven to a jury beyond a reasonable doubt. This argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See also United States v. Weiland*, 420 F.3d 1062, 1079, n.16 (9th Cir. 2005) (noting that *Almendarez-Torres* is binding precedent unless and until it is explicitly overruled by the Supreme Court).

AFFIRMED.